No. 86-949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARGUS INCORPORATED and
INTERPHOTO CORPORATION,

Petitioners,

v.

EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KODAK'S BRIEF IN OPPOSITION

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January 8, 1987

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Statement Pursuant to Rule 28.1

The subsidiaries and affiliates of Eastman Kodak Company, other than wholly owned subsidiaries, are listed below:

City Photo Limited

Consumer Developments Limited

Miller Bros. Hall & Company Limited

Ordinant S.A.R.L.

Photofinishers (Glasgow) Limited

Reflex Photo Works Limited

Sayett Canada Inc.

Softstrip International Limited

Stuart Photo Services Limited

Taylors Dev. & Printing Works Limited

The Roll Film Company Limited

Verbatim Commercial Ltd.

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Statement of the Case

Petitioners ("Argus" and "Interphoto") filed this action two months after the Second Circuit's decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (1979), *cert. denied*, 444 U.S. 1093 (1980), and initially asserted a litany of "antitrust" claims against respondent ("Kodak") relating to Kodak's introduction of numerous new products over the preceding 15 years, including many claims rejected in *Berkey* as a matter of law (*see* A71; P13-58).[1]

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[1] The appendices to the Petition are cited "A"; "P," "S" and "E" citations are to the joint appendix in the court of appeals.

After the district court held (552 F. Supp. 589) under the doctrine of collateral estoppel that Kodak was bound in this case by the *Berkey* determination that an agreement between Kodak and General Electric for joint development of the "flipflash" flash device and "110" amateur cameras to use it had unreasonably restrained trade among amateur camera manufacturers in 1975 (*see* 603 F.2d at 269 n.2, 300-304), petitioners stipulated to dismissal of all claims other than one based on that agreement (P321-32), even though neither of them was a camera manufacturer in 1975: Argus was a trademark licensor (A3; A34-40) and Interphoto a "full line" distributor of hundreds of photographic products made by others (A3; A40-44), with 110 cameras accounting for less than 5% of its sales (S1628).

Following the collateral estoppel determination, petitioners also contended for the first time that the "flipflash" agreement had caused their commercial demise (A12), through a "chain reaction" of eight or so stages (A6-7; A24-25; A48-49), leading to actual damages of some $57 million (A24), a remarkable escalation of their prior claim only for lost sales of 110 cameras (*see* A71). Although notified by Kodak that it intended to move against this claim as legally deficient (E3601-02), when required to state definitively their claims for trial, petitioners adhered to this single claim, declining to advance any other claim of injury and damages in the alternative (A7). Petitioners also expressly rested their claim of illegality solely on the *Berkey* determination and renounced any other theory of violation (A23; S1605).

Following the filing of the final pretrial order, Kodak moved for summary judgment on several alternative grounds (A20-21). Petitioners opposed the motion with an avalanche of papers (*see* A21), and the district court (Judge

Milton Pollack) directed a hearing pursuant to Rule 43(e) "to pierce the clouds of legal dust and get at the facts" (S691; *see* A26).

In a lengthy opinion considering all the "evidence" proferred by petitioners on paper and at the hearing, the district court granted summary judgment on four independently sufficient grounds (A68-70): (1) petitioners could not rely on *Berkey* and lacked standing (A28-47); (2) petitioners' claimed injury and damages were not proximately caused by the flipflash agreement (A47-59); (3) petitioners failed to adduce sufficient probative evidence of causation-in-fact to create a triable issue (A47-59), and (4) petitioners' damage theory was not legally admissible (A60-68). The district court also (A70-72) directed further proceedings to consider the award of an appropriate sanction under Rule 11 for petitioners' extended litigation of claims the court held were "contrived" (A53), lacked a "colorable basis" (A71) and would not have been asserted "by a reasonable businessman acting in good faith" (S1653).

The court of appeals (Judges Feinberg, Friendly and Winter) affirmed on the ground there was no triable issue as to causation-in-fact (A10), and did not reach the alternate grounds of lack of standing, absence of proximate cause as a matter of law, and inadmissibility of petitioners' damages theory. The court likewise did not address the question of Rule 11 sanctions as it was not yet the subject of a judgment (A19).[2]

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[2] The *Berkey* determination given collateral estoppel effect has been questioned by two members of this Court, *see* 444 U.S. 1093, and is in our judgment clearly erroneous. Kodak did not challenge the district court's collateral estoppel ruling on appeal (*see* A5) because that ruling was not the basis for any relief against Kodak and its reversal would not have been an adequate alternative ground for affirmance of the judgment in Kodak's favor.

Summary of Argument

This case does not present the questions posed by petitioners or any question warranting review by this Court. The decisions below did no more than apply settled law to undisputed facts to dismiss a case that was absurd in conception and abusive of the judicial process.

Argument

This case presents no question of general application. Rather, the decisions below were but a tempered and proper judicial disposition of this particular and peculiar case—a case in which petitioners sought to turn federal litigation into a new "line of business" in which "research and development" consisted of concocting fairy tales, "production" involved spinning those fairy tales out to a court, and the "return on investment" was projected to dwarf the fondest dreams of honest entrepreneurs.

A. The decisions below bear the indicia of careful and impartial deliberation which are the hallmarks of the judicial process. They follow settled law (A8-9; A25-28), and contain nothing which is bizarre or dubious. The grant of summary judgment alone certainly does not warrant a second appellate review in this Court. Summary judgment is "not a disfavored procedural shortcut," *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2555 (1986), and does not abridge the right to trial by jury, *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-21 (1902). One searches the court of appeals' opinion in vain for any indication that it "expressly adopted new standards which make it materially easier for a party seeking summary judgment to prevail" (Petition at 9) or for any suggestion that the court has determined to deny trials to litigants whose cases warrant trials so as "to economize on litigation resources" (Petition

at 7, 9).[3] The whole of petitioners' discourse (Petition at 6-13) on the evils of relaxed summary judgment standards simply has nothing to do with this case, and neither do the specific questions petitioners pose:

1. The court of appeals did not dismiss petitioners' claim because they "had not proven the full magnitude of damages which they claimed." (Petition i, Question 1; 14-16). The court of appeals nowhere discusses proof of an *amount* of damages; rather, it expressly found a failure "to present a triable issue of fact on the element of causation of the particular damages claimed," *i.e.*, damages for "lost profits on sales of Interphoto's and Argus' entire line of products, resulting in their commercial demise" (A5, A8; emphasis added). Petitioners deliberately renounced any claim limited to the sale of 110 cameras (Petition 14 n.15) and elected to proceed solely on the claim of injury to their entire businesses. Rejection of that claim in toto for lack of proof of causation has nothing to do with the "scope of damages" (Petition 14-15 n.16). Moreover, as the court of appeals held, the nature of petitioners' claim was such that no award could have been made "for any lesser claim" (A8).

2. The court of appeals' decision was not based on a misreading of *Matsushita* or a weighing of the evidence. (Petition i, Question 2; 16-26). The court of appeals naturally referred to *Matsushita* as a recent opinion of this court

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[3] Petitioners' suggestion (Petition 7-9) that Judges Posner and Easterbrook join in their criticism of the decision below is spurious. Judge Posner's decision in *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), affirmed a grant of summary judgment. Judge Easterbrook picks no quarrel with the grant of summary judgment in proper cases, but states the undisputed point that evidence is not to be weighed in ruling on such motions; he also suggests that Rule 43(e) hearings on summary judgment motions should be "rare," not that they are improper (Petition 8-9). Neither Judge Posner nor Judge Easterbrook commented on this case.

on summary judgment, but its decision of this case did not rest solely on *Matsushita* or any other single precedent (*see* A8-9). The court of appeals' review of the evidence to determine whether a triable issue of fact existed was just that, a review not a "weighing," and its comments about the "implausibility" of petitioners' claim (*see* A14-15) were premised on basic and undisputed facts, not a "body of evidence" or a context "created" or "constructed" by the court as petitioners would have it (Petition at 19-25). Likewise, the court's discussion of petitioners' allegedly countervailing "evidence" (A16-19) shows that "evidence" to be wholly lacking in probative value—a showing petitioners do not attack.

3. The court of appeals did not even pose, much less adopt, the proposition that petitioners were required "to establish that respondent's violation was the exclusive cause of petitioners' injury" (Petition i, Question 3; 26-29). The court's reference to the success of integral flash cameras (A15) was a reference to an undisputed market fact, one among many that underscored the absurdity of petitioners' claim. As the court also noted, but the Petition (page 28) ignores, the "lead line" Interphoto had lost was not an Argus 110 camera with or without flipflash, but the Yashica 35 millimeter camera (A15-17), and any other business Interphoto may have lost in 1975 went to competitors who were themselves without a 110 flipflash camera (*see* A18; S1637-38). These were but a few of the many considerations why, given petitioners' inability to support their claim with facts, summary judgment was required.

B. This case was a contrived abuse of the judicial process from its inception. The district court's opinion alludes in brief to petitioners' dishonest and vexatious conduct (A71), and this conduct was further discussed in limited supplemental findings which noted that petitioners' officers

had contradicted themselves under oath when it served petitioners' varying litigation purposes, that their deposition transcripts were altered prior to signature to conform to petitioners' positions, that petitioners' chairman and chief executive officer had falsely testified in open court that Interphoto had ordered $2.5 million of 110 cameras to serve as its 1975 "lead line" (this being the keystone of petitioners' whole case) and then had recanted this fictional testimony when petitioners' own belatedly produced business records showed it to be untrue in its entirety (S1648-50). Dismissal of such a case is proper under any reading of Rule 56, and would be justified absent any rule providing for summary judgment as an exercise of the courts' inherent power to control the invocation of their own process and to prevent the abuse thereof. There is no right, constitutional or otherwise, to trial of fabricated cases.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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